



Case No. 1:15-CV-02306  
Gwin, J.

On November 11, 2015, Defendant again removed the case to federal court. This time, Defendant removed under the theory of federal question jurisdiction under the Class Action Fairness Act (“CAFA”).<sup>6/</sup> Plaintiff challenges whether Defendant’s removal under CAFA was timely.

Jurisdiction under CAFA requires showing that the amount in controversy exceeds \$5 million. Defendant states that “in preparation for the October 29, 2015 mediation” Defendant applied its sales figures to the Plaintiff’s theory of damages and determined, for the first time, that Plaintiff’s sought “just over \$5 million in damages.”<sup>7/</sup>

Plaintiff now moves to remand the case back to state court. Plaintiff provides a wide array of alternative theories why removal was improper. But the most persuasive is this: Defendant had thirty days to remove the case from the time the case became removable, and Defendant failed to do so.

The Amended Complaint was filed in April 2015. Defendant filed this notice of removal more than six months later in November 2015. Defendant claims that they only became aware of CAFA jurisdiction when running sales numbers in preparation for mediation on October 29, 2015. However, Defendant possessed its own sales data at the time the Amended Complaint was filed. Defendant was able to “ascertain” CAFA jurisdiction from that point forward.<sup>8/</sup>

Plaintiff also raises persuasive arguments that, from the time of the April 2015 Amended

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<sup>6/</sup>*Id.*

<sup>7/</sup>*Id.*

<sup>8/</sup>Defendant submits an affidavit attesting that it could only ascertain that the amount in controversy was above \$5 million when it ran its up-to-date sales numbers through October 15, 2015. Doc. [11-1](#). However, Defendant has never had the burden of proving the \$5 million threshold to a legal certainty. Rather, Defendant’s burden is to establish by a preponderance of the evidence that the amount in controversy would be greater than \$5 million. [Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 404 \(6th Cir. 2007\)](#). Given Visionworks’ knowledge of its own sales data, this was possible from the time of the Amended Complaint or, at the very least, from the time Plaintiff provided his damages formula on September 18, 2015. See Doc. [11-1](#).

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Complaint, Defendant could have alternatively sought removal under diversity jurisdiction.

Under either theory, Defendant's removal is untimely. A notice of removal must "be filed within 30 days after receipt by the defendant . . . of an amended pleading . . . or other paper . . . from which it may first be ascertained that the case is one which is or has become removable."<sup>9/</sup> To qualify for this reset of the time for removal, the statute requires that the initial pleading not have been removable.<sup>10/</sup> Defendant has conceded this, despite its own earlier attempt at removal.<sup>11/</sup> If it had not, then the time for removal would have certainly elapsed already.<sup>12/</sup>

For these reasons, the Court **GRANTS** Plaintiff's motion to remand. The Court does not have jurisdiction. The Court **DENIES** Plaintiff's motion for attorney's fees as moot.

IT IS SO ORDERED

Dated: January 11, 2016

s/ James S. Gwin  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>9/</sup>[28 U.S.C. 1446\(b\)\(3\)](#).

<sup>10/</sup>*Id.*

<sup>11/</sup>Doc. [11](#) at 3-4.

<sup>12/</sup>*See* Doc. [6](#) at 1.